No. 10-11

IN THE

Supreme Court of the United States

WORLDWIDE NETWORK SERVICES, LLC, AND
WORLDWIDE NETWORK SERVICES INT'L, FZCO

Petitioners,

v.

DYNCORP INTERNATIONAL LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in vacating the punitive damages award for lack of evidence of malice or reckless indifference toward petitioners' federally protected rights.

CORPORATE DISCLOSURE STATEMENT

DynCorp International LLC is a wholly owned subsidiary of DynCorp International Inc., which is a wholly owned subsidiary of Delta Tucker Holdings, Inc., which is a wholly owned subsidiary of DefCo Holdings, Inc., which is a wholly owned subsidiary of Cerberus Capital Management, L.P., a private company.

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INTRODUCTION

This case arises out of a contract dispute between respondent DynCorp International LLC and petitioner Worldwide Network Services, LLC (WWNS). DynCorp contracted with the United States Department of State to provide police training services in Iraq and Afghanistan, and subcontracted with WWNS to provide information-technology and communications services in support of this police training mission. In July 2006, after the State Department repeatedly and forcefully complained about the poor quality of WWNS's work and threatened actually to terminate DynCorp's contract unless the serious problems were corrected, DynCorp decided not to renew WWNS's subcontract.

WWNS, which is a minority-owned corporation certified by the Small Business Administration, brought suit alleging that DynCorp's decision not to renew the subcontract was racially discriminatory in violation of 42 U.S.C. § 1981. At trial, WWNS presented no evidence that DynCorp's program manager who made the decision not to renew the subcontract was motivated by race; its own witnesses conceded that he was a "straight-shooter." Instead, the trial veered off into testimony regarding alleged racially oriented comments by subordinate employees who did not make the decision to allow WWNS's subcontract to expire and had no authority to make that decision. The district court, however, refused to instruct the jury on the proper standard for imputing racial animus to a corporation under § 1981, and the jury returned a verdict for WWNS, awarding it $3.42 million in compensatory damages and $10 million in punitive damages.

In an unpublished opinion, the Fourth Circuit affirmed the compensatory award but vacated the punitive damages. Applying this Court's decision in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), the court of appeals concluded that the punitive award could not stand because there was no evidence that DynCorp acted with malice or reckless indifference to WWNS's federally protected rights and, independently, because the jury instructions misstated the standard for awarding punitive damages under *Kolstad*.

WWNS now seeks review of only the first of these two alternative holdings. It argues that the Fourth Circuit erred in refusing to consider the supposedly "egregious" nature of DynCorp's conduct as relevant evidence supporting the punitive damages award. As WWNS admits, however, the Fourth Circuit did not address the question whether egregious conduct can support a punitive award—it had no occasion to because it disagreed with WWNS's assessment of DynCorp's conduct as "egregious." Instead, the court faithfully applied *Kolstad*, "combing the record" and finding no evidence that DynCorp acted in the face of a perceived risk that failing to renew WWNS's subcontract might violate § 1981.

The Fourth Circuit's factbound application of *Kolstad* is correct and does not conflict with the decisions of any other circuits. No doubt recognizing as much, WWNS resorts to transparent mischaracterizations of both the decision below and prior Fourth Circuit cases, attributing to them a "rule" the Fourth Circuit has never adopted. In place of that phantom "rule," WWNS proposes a rule that no court has ever adopted, all the while ignoring the fact that even if this Court were to adopt that rule, it would not change the outcome of this case because

the decision below rests on an independent ground that WWNS has not challenged. In sum, WWNS's petition for certiorari is meritless and should be denied.

STATEMENT OF THE CASE

1. DynCorp is a government contractor that performs security and peacekeeping services throughout the world, primarily in war-torn areas such as Iraq, Afghanistan, and Somalia. In 2004, DynCorp won a recompetition for a contract in support of the State Department's civilian police (CIVPOL) programs in Iraq and Afghanistan. The CIVPOL contract was DynCorp's largest single government-services contract; together with the related Worldwide Protective Services contract, it generated "a large majority" of DynCorp's total revenue. J.A. 1608.

WWNS is a small company owned in part by Walter Gray and Reginald Bailey, who are African-American. In 2004, after Gray and Bailey met DynCorp's former CEO, Steven Cannon, DynCorp awarded WWNS a subcontract under the CIVPOL program for IT and communications services in Iraq and Afghanistan. J.A. 42–85, 818–21. Before it began working for DynCorp, WWNS's work had consisted entirely of "small things" such as installing software and networks for local banks. *Id.* at 590.

Reliable satellite, radio, and IT equipment and services are vital to DynCorp's mission in Iraq and Afghanistan—miscommunications on the ground can be fatal. Yet throughout the two-and-a-half years of WWNS's performance under the subcontract, personnel from DynCorp, the State Department, and WWNS itself complained repeatedly about numerous problems with WWNS's performance, including

improper installation of equipment and software; untimely and improper maintenance of networks; and lack of qualified personnel to maintain and support the systems. See, *e.g.*, J.A. 115–18, 164–67, 1053–54, 1614–16, 2463–67, 2604, 2660, 2760, 2778.

The problems with WWNS's severely deficient performance came to a head in 2006, when in the space of just six months DynCorp received three letters from high-ranking State Department officials complaining in unusually graphic terms about WWNS's performance and threatening to terminate DynCorp's massive CIVPOL contract in its entirety as a result.

The first letter, dated January 9, 2006, and addressed to DynCorp's CEO, was from Principal Deputy Assistant Secretary for the Bureau of International Narcotics and Law Enforcement (INL) Thomas Schweich. He stated bluntly that "WWNS's technical performance has in general been inadequate to the point where it has disrupted critical communications in the field." J.A. 117. Schweich urged DynCorp to give the problem its "immediate attention," and threatened to "resort to a cure notice"—the final step before contract termination—if DynCorp did not "develop and implement a credible corrective action plan and ensure that necessary changes are effected." *Id.* at 115, 117.

In a second letter dated January 26, 2006, John D. Smith, the State Department's INL representative in Baghdad, wrote a blistering five-page memorandum complaining in detail about WWNS's performance. J.A. 2463–67. He catalogued a number of "severe shortcomings" in WWNS's performance, including radios that fell "far short of meeting [needs]," "regular service outages," "poor insulation on connections

to outside equipment," and highly sensitive wireless networks protected by flawed encryption technology that could be "cracked within minutes using a variety of utilities available in the public domain on the Internet!" *Id.* at 2464–66. "In short," Smith exclaimed, "the networks are in a state of disarray, disrepair, unmanageable, unsecured, and chaotic!" *Id.* at 2465. As a result of these problems and a long "list of similar examples," Smith complained, "the networks are in a catastrophic state barely capable of delivering service of any quality." *Id.* at 2466.

In the ensuing months, DynCorp attempted to manage WWNS more closely in an effort to improve its performance, but serious performance deficiencies continued. In May 2006, U.S. Ambassador Newman complained to DynCorp personnel in Afghanistan about the poor communications systems provided by WWNS. J.A. 1629–31. And on June 23, 2006, the State Department wrote a third letter to DynCorp complaining of "pervasive information technology (IT) performance deficiencies on all DynCorp Task Orders." *Id.* at 164. Signed by the State Department's contracting officer, Benita Williams, and directed to DynCorp's CEO, the letter reminded DynCorp about INL's numerous "written and verbal complaints about IT performance over the past two years," and provided a three-page bullet-point list of "specific issues that have been raised." *Id.* Williams made clear that the persistence of these problems was unacceptable:

> The varied nature of these problems and their pervasiveness suggests that they are systemic and consequently need to be addressed at higher levels of your organization than has previously been the case. I would like to arrange a meeting to discuss this broad spectrum of information

> technology deficiencies with your program managers, including at least one senior member of your information technology staff, and INL representatives.

Id. at 167.

Three weeks later, in mid-July 2006, DynCorp vice-president and CIVPOL program manager Richard Cashon decided not to renew WWNS's subcontract. J.A. 1676. Cashon based his decision on internal reports DynCorp had prepared on WWNS's performance and on the State Department's repeated complaints. *Id.* at 1050–62, 1675–76, 1684–86. In particular, the June 23 letter from the contracting officer "weighed heavily" on his decision because she was the one who could issue a cure notice that could lead directly to a decision to terminate DynCorp's contract for cause. *Id.* at 1056–57. As Cashon explained, "I didn't feel like that we could afford to move forward, award a new task order to WWNS, put them in our proposal, and tell the State Department that we're still correcting problems. I just did not feel like we could do that and survive staying on the contract." *Id.* at 1676.

DynCorp's board of directors and senior executives concurred with Cashon's conclusion. At a board meeting on July 13, 2006, the chairman of the board questioned DynCorp's CEO, Steven Cannon—who was responsible for DynCorp's relationship with WWNS and had been WWNS's strongest defender in the company—regarding "complaints received from the State Department." J.A. 2670. "Cannon responded that it might become necessary to replace the subcontractor in question." *Id.*

2. In October 2006, WWNS brought this action alleging that DynCorp's decision not to renew its

subcontract was racially discriminatory in violation of § 1981. At trial, however, WWNS presented no evidence that Cashon's decision was motivated by race. To the contrary, WWNS's own witnesses conceded that Cashon never made discriminatory remarks and in fact that he was a "straight-shooter." J.A. 829, 905, 1232, 1740. Instead, WWNS's case centered on discriminatory remarks allegedly made by subordinate employees who neither made nor had authority to make the decision not to renew WWNS's subcontract.

Leon DeBeer. WWNS employee Charlie Jones testified that Leon DeBeer, a low-level IT manager for DynCorp in Iraq, uttered numerous racial epithets on a daily basis. J.A. 902. DeBeer, a white South African, allegedly referred to one of WWNS's owners using racial slurs. *Id.* at 872, 931. DeBeer had no authority with respect to renewal of WWNS's subcontract; the only evidence of his role in the decision was Cashon's testimony that DeBeer "provided information" regarding WWNS's performance and that Cashon "used that information, along with other information [he] had, in making [his] decision." *Id.* at 937.

Mike Kehoe. Jones also testified that Mike Kehoe, a deputy program manager assigned to a different contract, once referred to WWNS as " 'where white men never stay.' " J.A. 892. WWNS did not allege that Kehoe had any role in the decision not to renew its subcontract, and in fact he had none. *Id.* at 889. Yet WWNS featured Kehoe's alleged remark prominently at trial and even displayed a demonstrative exhibit stating, "WWNS"—"Where White [P]eople Never Stay." *Id.* at 572.

William Cavanaugh. Former DynCorp employee Richard Spencer testified regarding a dinner of

DynCorp's senior government-services staff held in October 2006—three months after the decision was made not to renew WWNS's subcontract. Spencer testified that William Cavanaugh, a business-development manager, gave a mock presentation in honor of the departure of Richard Walsh, a DynCorp vice-president and IT expert who had been brought on to mentor WWNS in response to the State Department's complaints. Cavanaugh gave Walsh a T-shirt that said "WWNS—I took them down and all I got was this lousy T-shirt," and allegedly read a series of fictitious letters, the last of which purported to be from Gray. J.A. 1021–23, 1027–30, 1139. According to Spencer, Cavanaugh attempted to imitate Gray, but "[d]id a very bad imitation . . . because then he started speaking like—who's that character on—on Fat Albert." *Id.* at 1023. Spencer could not recall the substance of the letter, only that Cavanaugh's "bad impression" of Gray came across as his "interpretation of Ebonics." *Id.* at 1029. Cavanaugh had no role in the decision not to renew WWNS's subcontract. *Id.* at 1147.

3. In contrast to this barrage of racially charged evidence regarding subordinate employees who neither made nor had authority to make any decisions regarding WWNS's subcontract, WWNS presented only three pieces of evidence regarding individuals who it claimed participated in Cashon's decision not to renew the subcontract. As Judge Niemeyer observed, in an understatement, the evidence of alleged animus by these individuals was "much weaker and more isolated" than that attributed to subordinate employees. Pet. App. 50a (opinion concurring in part and dissenting in part).

First, Spencer testified that Walsh and Robert Rosenkranz, the president of the government-services

division and Cashon's supervisor, laughed during Cavanaugh's roast of Walsh at the Tyson's Corner dinner. J.A. 1029. According to Spencer, however, "everybody was laughing." *Id.* at 1022–23. This would have included Michelle Beale, Rosenkranz's office manager, who is African-American. *Id.* at 1112–14.

Second, over DynCorp's objection as to relevance, WWNS presented evidence that DynCorp had fired Spencer, who is Hispanic, and that Rosenkranz had signed the termination letter. J.A. 1019–21. Spencer speculated that he had been terminated because of his race, but provided no evidence to substantiate that claim. See *id.* Moreover, Spencer specifically declined to attribute racial animus to Rosenkranz, explaining that he had "a fairly good" relationship with Rosenkranz, *id.* at 1020; that Rosenkranz was "not a bad guy," *id.*; and that as a retired two-star general, Rosenkranz would not have made decisions based on race, *id.* at 3160-A.

Third, during its rebuttal on the last day of trial—without any prior disclosure to DynCorp and in flagrant violation of Federal Rule of Civil Procedure 26(e)—WWNS called one of its owners, John Mack. Mack self-servingly claimed that at a meeting sometime in late 2005, Walsh had called Gray "a stupid black mother—." J.A. 1722–23. DynCorp moved to strike Mack's ambush testimony but the district court refused, stating that it would be futile "to tell the jury to disregard the hot poker that has just been put in front of their face." *Id.* at 1730. The court of appeals held that WWNS "clearly violated Rule 26(e)" by failing to disclose Mack's allegation during discovery or at any other time during the previous 20 months of litigation, and that "no substantial justification existed" for WWNS's lying in

the weeds, but concluded that Mack's testimony was somehow harmless. Pet. App. 28a–30a.

4. In light of the extensive evidence WWNS had presented of alleged animus by subordinate employees, DynCorp asked the district court to instruct the jury on the appropriate standard for imputing racial bias to a corporation under § 1981. In particular, DynCorp asked the court to instruct the jury in accordance with the en banc Fourth Circuit's decision in *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (2004), which held that a plaintiff may not rest a discrimination claim against a corporation on the discriminatory motivations of a subordinate employee unless the employee was the actual decisionmaker or the one principally responsible for the decision at issue. *Id.* at 289. The district court refused to give DynCorp's proposed instruction, concluding that WWNS was required only "to prove the corporation was liable," and "the jury doesn't have to specify which person did what." J.A. 1656. The court instead instructed the jury that it should find for WWNS if it concluded that "DynCorp had a discriminatory purpose or motive." *Id.* at 1959.

In accordance with this Court's decision in *Kolstad*, DynCorp also asked the district court to instruct the jury that punitive damages were available only if "a higher management official of DynCorp personally acted with malice or reckless indifference to WWNS's federally protected rights." J.A. 1186. The district court refused and instead gave a *sua sponte* instruction authorizing the jury to award punitive damages if it found that "DynCorp, maliciously or with reckless indifference discriminated against WWNS." *Id.* at 1645, 1966.

The jury returned a verdict for WWNS, awarding it $3.42 million in compensatory damages and $10 million in punitive damages.

5. In an unpublished and badly divided set of opinions, the Fourth Circuit affirmed as to liability under § 1981 but vacated the punitive damages award. Over Judge Niemeyer's dissent, the panel held that the district court did not err in refusing to instruct the jury to disregard the motivations of subordinate employees. Pet. App. 18a–23a. "As a result, the jury was permitted to consider the racial animus *of any employee* whose influence '*actually led* to the decision,'" regardless of whether that employee made or was principally responsible for the decision not to renew WWNS's subcontract. *Id.* at 52a (Niemeyer, J., concurring in part and dissenting in part).

The court of appeals vacated the punitive damages award for two independent reasons. *First*, the court found no evidence that DynCorp acted with malice or reckless indifference to WWNS's federally protected rights, as required by this Court's decision in *Kolstad*. Pet. App. 30a–35a. After "combing the record," *id.* at 35a, the court found no evidence that DynCorp had "acted in the face of a perceived risk that its decision would violate federal law," *id.* at 31a (internal quotation marks and alteration omitted). In addition, the court noted that "the legal theory WWNS advanced was 'novel or otherwise poorly recognized,' because whether a corporation may sue under § 1981 was never crystal clear." *Id.* at 35a n.13 (internal citation omitted) (quoting *Kolstad*, 527 U.S. at 537).

Second, "[e]ven aside from the above error," the court concluded that "the award of punitive damages could not stand because the district court's jury instruction on punitive damages was also erroneous."

Pet. App. 35a–36a. The instruction permitted the jury to award punitive damages if "'DynCorp maliciously, or with reckless indifference, discriminated against WWNS,'" but "never defined 'malice' or specified to what 'reckless indifference' refers." *Id.* at 36a. Because "a layperson would not know" that these terms have "a technical legal meaning relating to awareness that one may be breaking the law," the instruction left the jury "in complete ignorance of fundamentally controlling legal principles." *Id.* at 36a–37a (internal quotation marks and omission omitted). And because "WWNS ha[d] not identified any evidence that DynCorp suspected that terminating the CivPol Subcontract might violate federal law," "serious prejudice necessarily resulted from the challenged instruction." *Id.* at 37a.

WWNS petitioned for rehearing and rehearing en banc, arguing that the panel's decision vacating the punitive damages award conflicted with *Kolstad*, prior Fourth Circuit precedent, and decisions of other courts of appeals. The court denied the petition without calling for a response from DynCorp. Pet. App. 3a. "No judge requested a poll . . . on the petition for rehearing en banc." *Id.*

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this case does not satisfy the Court's criteria for certiorari review. The decision below correctly applied this Court's controlling decision in *Kolstad* and, as WWNS concedes, did not address the question presented in WWNS's petition. No circuit conflict exists on the standard for awarding punitive damages; the law is well settled and has been since *Kolstad*. The Fourth Circuit did not adopt the "rule" WWNS attributes to it, and no court has adopted the

rule WWNS proposes. And the decision below is supported by an independent ground that would require affirmance regardless of how the Court ruled on the question presented. The petition lacks merit and should be denied.

I. THE FOURTH CIRCUIT FAITHFULLY APPLIED *KOLSTAD*.

1. In *Kolstad*, this Court considered the standard for awarding punitive damages under 42 U.S.C. § 1981a. Modeled on the common-law standard described in *Smith* v. *Wade*, 461 U.S. 30 (1983), § 1981a limits punitive damages to cases in which the defendant discriminated "with malice or reckless indifference to the federally protected rights of an aggrieved individual."

Kolstad held that this standard "ultimately focus[es] on the actor's state of mind." 527 U.S. at 535. "The terms 'malice' or 'reckless indifference,'" the Court explained, "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* Accordingly, to be liable in punitive damages, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

Under this standard, the Court made clear that not every instance of intentional discrimination will warrant punitive damages. "In some instances," for example, "the employer may simply be unaware of the relevant federal prohibition." *Id.* at 536–37. In other instances, the employer may "discriminat[e] with the distinct belief that its discrimination is lawful." *Id.* at 537. In still others, the plaintiff's "underlying theory of discrimination may be novel or otherwise poorly recognized." *Id.*

Because the punitive damages standard turns on the defendant's subjective state of mind, the Court rejected the argument that punitive damages are available only when the defendant's conduct is objectively "egregious." *Id.* at 538–39. Although "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive,'" the Court concluded that such a showing is not necessary because "eligibility for punitive awards is characterized in terms of a defendant's motive or intent." *Id.* at 538.

2. The Fourth Circuit faithfully applied *Kolstad* in vacating the punitive damages award for lack of evidence of malice or reckless indifference to WWNS's federally protected rights. As an initial matter, punitive damages should never have been awarded in this case because the jury was improperly allowed to consider evidence of racial animus by subordinate employees who neither made nor had authority to make the decision not to renew WWNS's subcontract. As Judge Niemeyer explained, the case should have been remanded for a new trial to permit a properly instructed "jury to resolve who DynCorp's decisionmaker or decisionmakers were and whether *they* were actually motivated by racial animus." Pet. App. 41a (opinion concurring in part and dissenting in part); see also *Staub* v. *Proctor Hosp.*, No. 09-400 (U.S. Apr. 19, 2010) (certiorari granted on the question, "In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?").

Even accepting the panel's decision as to liability, however, the decision below is fully consistent with *Kolstad*. The court of appeals properly stated the controlling rule of law—that punitive damages are

available only when the employer discriminates "'in the face of a perceived risk that its actions will violate federal law.'" Pet. App. 31a (quoting *Kolstad*, 527 U.S. at 536). It then "comb[ed]" the massive record in this case and found no "evidence that DynCorp terminated the CivlPol Subcontract in the face of a perceived risk that its decision would violate federal law." *Id.* at 34a–35a (internal quotation marks and alteration omitted).

In addition, the court noted that WWNS's theory of liability was novel or poorly recognized because it is far from clear that corporations like WWNS even *have* federally protected rights under § 1981. See Pet. App. 35a n.13; see also *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 473 n.1 (2006) ("[W]e have no occasion to determine whether . . . a corporation . . . *could* have brought suit under § 1981."); *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("a corporation . . . has no racial identity and cannot be the target of . . . discrimination").

Putting WWNS's overblown rhetoric aside, the decision below is thus no more than a routine and unremarkable application of *Kolstad*. WWNS indeed failed to present any evidence that DynCorp knew that not renewing WWNS's subcontract might violate federal law. In any event, WWNS's "asserted error" at best "consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. WWNS thus asks this Court to expend its limited resources to engage in the very definition of factbound error-correction where no error is apparent. The petition should be denied for that reason alone.

3. Unable to identify anything in the decision below that conflicts with *Kolstad*, WWNS asks this

Court to grant review on a question that WWNS acknowledges "the court of appeals declined to address or consider"—namely, whether egregious discrimination can itself support an inference of malice or reckless indifference to the plaintiff's federally protected rights. Pet. for Cert. 3. Of course, the fact that the court of appeals did not address the question on which WWNS seeks review is alone sufficient reason to deny the petition. See Eugene Gressman et al., *Supreme Court Practice* 506 (9th ed. 2007) (when "the petition raises questions that were not decided by the court below," that "defect is ordinarily fatal to the petition"). There are two additional reasons as well.

First, the factual predicate for WWNS's argument—that this case involves egregious discrimination—is wrong. The record contains overwhelming evidence of WWNS's deficient performance, exemplified most dramatically by the State Department's three complaint letters threatening to terminate DynCorp's largest contract with its most important customer if it did not remedy the situation with WWNS. Moreover, it is beyond dispute that the individual who made and was principally responsible for the decision not to renew WWNS's subcontract—Cashon—acted both without racial animus and with ample legitimate cause. In these circumstances, DynCorp's decision not to renew WWNS's subcontract cannot fairly be described as "egregious."[1]

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[1] *See, e.g., Smith* v. *Xerox Corp.*, 602 F.3d 320, 336 (5th Cir. 2010) (punitive damages not warranted "[i]n light of the competing evidence that impugned [the plaintiff's] performance"); *Webner* v. *Titan Distribution, Inc.*, 267 F.3d 828, 837 (8th Cir. 2001) (same because the defendant's "actions [were] consistent with an employer acting to protect itself");

To be sure, the record also contains inflammatory evidence of racial animus by subordinate employees. But the evidence of animus by DynCorp's actual decisionmaker (Cashon) was nonexistent, and the evidence as to the other executives who WWNS claims participated in the decision (Rosenkranz and Walsh) was vanishingly thin. The bulk of WWNS's evidence at trial focused on racially derogatory comments allegedly made by subordinate employees like DeBeer who had no decisionmaking authority with respect to renewal of WWNS's subcontract. Although these alleged comments were undoubtedly odious and offensive, which explains the jury's verdict, they did not render the decision at issue—DynCorp's corporate decision to end its relationship with WWNS in order to salvage its relationship with the State Department—an aggravated instance of racial discrimination warranting punitive damages.[2]

The court of appeals did not reach a contrary conclusion. It did not characterize DynCorp's conduct as "egregious"; indeed, the word "egregious" does not appear in the court's opinion. The court thus did not

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Tincher v. *Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1133 (7th Cir. 1997) (same because the "issue of liability . . . was extremely close" and "another jury could just as easily have found that [the defendant's] reason for the termination was not pretextual"); *Stephens* v. *S. Atl. Canners, Inc.*, 848 F.2d 484, 492 (4th Cir. 1988) (same because the plaintiff's poor performance "came very close to jeopardizing the business relationship his employer had with a major customer").

[2] *See, e.g.*, *Kolstad*, 527 U.S. at 543 (an employer may be held vicariously liable in punitive damages only for the acts of managerial-level employees); *EEOC* v. *Fed. Express Corp.*, 513 F.3d 360, 372 (4th Cir.) (punitive damages are available only if "the employer's *decision maker* discriminated in the face of a perceived risk that the decision would violate federal law") (emphasis added), *cert denied*, 129 S. Ct. 343 (2008).

deem egregious conduct "irrelevant to the punitive damages question," as WWNS contends. Pet. for Cert. 8. It never reached that question. Nor did even Judge Jones in dissent conclude that "the egregious discrimination in this case" supplied the requisite evidence of malice or reckless indifference. *Id.* at 7. Judge Jones (wrongly) found sufficient evidence that DynCorp decided not to renew WWNS's subcontract "in the face of knowledge that 'it may be acting in violation of federal law.'" Pet. App. 59a–60a (opinion concurring in part and dissenting in part) (quoting *Kolstad*, 527 U.S. at 535). But nowhere did he suggest that the supposedly "egregious" nature of DynCorp's conduct supported the award.

Second, even if the court of appeals had concluded *sub silentio* that DynCorp's decision not to renew WWNS's subcontract was "egregious," the decision below still would not conflict with *Kolstad*. The Court in *Kolstad* stated only that egregious conduct "*may* serve as evidence supporting" the requisite inference of malice or reckless indifference. 527 U.S. at 538 (emphasis added). *Kolstad* did not hold that egregious conduct *always* supports a punitive award, let alone that it is always independently *sufficient* to sustain an award without any evidence that the defendant perceived a risk that its conduct might violate federal law.

Indeed, *Kolstad* said little about the circumstances in which egregious conduct might support an inference of malice or reckless indifference. But it said enough to make clear that the controlling issue is the defendant's state of mind, and the nature of the defendant's conduct is relevant only to the extent it suggests the defendant was aware of the plaintiff's federally protected rights. As the Court explained, "[c]onduct warranting punitive awards has been

characterized as 'egregious' . . . *because* of the defendant's mental state," and "the reprehensible character of the conduct is not generally considered apart from the requisite state of mind." *Id.*

Attempting to manufacture a conflict with *Kolstad*, WWNS insinuates that the court of appeals held that egregious conduct can *never* support a punitive damages award. See Pet. for Cert. 11 (arguing that the court adopted a "rule that egregious evidence of racism itself cannot establish the requisite mental state"); *id.* at 13 (asserting that the court refused "to consider the egregiousness of discriminatory conduct as relevant evidence"). Of course, the decision below held no such thing. The court said nothing about whether or when egregious conduct might support a punitive damages award. And even if it had, the decision would not be binding on future Fourth Circuit panels because it is unpublished. Pet. App. 7a.

Undeterred, WWNS contends that the court of appeals was "woodenly" following prior Fourth Circuit decisions holding that egregious conduct is irrelevant. Pet. for Cert. 10–12. But all of the decisions WWNS cites, like this case, involved only factbound applications of *Kolstad*. None held or even suggested that egregious conduct is never relevant in assessing malice or reckless indifference. Indeed, one of the decisions WWNS cites expressly relied on the "rank offensiveness" of the defendant's conduct as evidence supporting the punitive damages award. *Anderson* v. *G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002). In claiming that the Fourth Circuit "refus[es] to consider the egregiousness of discriminatory conduct as evidence of the requisite mental state for punitive damages," Pet. for Cert. 10–11, WWNS is tilting at windmills.

For these reasons, the Fourth Circuit's decision is correct and certainly does not conflict with *Kolstad*. WWNS's suggestion that the decision below should be summarily reversed in light of *Kolstad* is frivolous. If anything, summary reversal would have been appropriate had the court of appeals sustained the punitive damages award on this record.

II. THERE IS NO CIRCUIT CONFLICT ON THE QUESTION PRESENTED.

WWNS's attempt to conjure a circuit split fares no better. As evidence of the supposed conflict, WWNS points to decisions in other circuits that have considered egregious conduct a relevant factor in assessing malice or reckless indifference to federally protected rights. Pet. for Cert. 13–14. These decisions do not conflict with the decision below because the Fourth Circuit (1) did not conclude that DynCorp's conduct was "egregious"; and (2) did not hold, and has never held, that egregious conduct is irrelevant to the punitive damages inquiry. WWNS's imagined conflict rests on a gross mischaracterization of both the decision below and prior Fourth Circuit precedent. Because the Fourth Circuit has never adopted the "rule" WWNS attributes to it, WWNS's attempt to gin up a circuit split is not only off-track; it never leaves the station.

In fact, *Kolstad* has produced no discernible confusion in the lower courts. All courts recognize that "the guiding inquiry is whether the defendant acted in the face of a perceived risk that his actions will violate federal law." *DiMarco-Zappa* v. *Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001) (internal quotation marks and alteration omitted). The six cases WWNS cites (and the dozens of others it does not) are merely applications of this settled rule to the varying facts of each particular case. Courts have had

no trouble understanding or applying *Kolstad*, and no divisions have arisen among the circuits as to any unresolved legal questions left in its wake. All that remains is application of law to fact.

Moreover, just as no court has adopted the rule WWNS mistakenly attributes to the Fourth Circuit, no court has adopted the rule WWNS proposes—that egregious conduct *always* supports a punitive damages award. To the contrary, courts have held that "the presence (or absence) of [egregious] acts does not in itself determine the propriety (or lack of propriety) of punitive damages in a given case." *Iacobucci* v. *Boulter*, 193 F.3d 14, 26 (1st Cir. 1999). Hewing to *Kolstad*, courts have recognized that each case must be analyzed on its own facts, and have held only that egregious conduct *may* in certain circumstances support the requisite inference as to the defendant's mental state.[3] Courts have held, for

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[3] *See, e.g.*, *Smith*, 602 F.3d at 336 ("Although egregious or outrageous conduct *can* support an inference of 'evil motive,' that showing is not present here." (footnote omitted)); *Méndez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 49 (1st Cir. 2009) ("[W]e have observed that if a defendant's conduct is 'egregious or outrageous,' it *may* suggest an awareness of its illegality."); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 796 (8th Cir. 2004) ("Thus, *in this case* the same evidence that the jury used to support its finding of racial motivation . . . also supports an inference of intentional and malicious conduct . . . ."); *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005) (egregious conduct "*may* serve as evidence supporting" the requisite inference) (internal quotation marks omitted); *Powell* v. *Alexander*, 391 F.3d 1, 19 (1st Cir. 2004) (egregious conduct may serve "*in appropriate circumstances*, both as evidence of the alleged violation of a federal right and as evidence of the defendant's awareness of the risk that her actions would violate that federal right"); *Passantino* v. *Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir. 2000) ("egregious conduct *could be* evidence of intent to break

example, that an employer's efforts to conceal its discriminatory conduct "may demonstrate that the employer acted with the requisite mental state." *Hall* v. *Consol. Freightways Corp. of Del.*, 337 F.3d 669, 675 (6th Cir. 2003). But no court has held that punitive damages are appropriate whenever the defendant's conduct can be characterized as "egregious," regardless of whether that conduct reveals an awareness of the plaintiff's federally protected rights.

Nor has any court held that egregious conduct is always (or indeed ever) independently *sufficient* to sustain a punitive damages award absent any evidence that the defendant knew its conduct might be unlawful. Rather, courts have recognized that the "standard for punitive damages requires something more than the employer's mere awareness that its conduct constitutes intentional discrimination however egregious it might be." *Hysten* v. *Burlington N. Santa Fe Ry.*, 530 F.3d 1260, 1278 (10th Cir. 2008). WWNS cites no authority to the contrary. All of the cases it cites, with one possible exception, relied on the defendant's knowledge of the plaintiff's federally protected rights in addition to the egregiousness of its conduct.[4]

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the law"); *Hertzberg* v. *SRAM Corp.*, 261 F.3d 651, 661 (7th Cir. 2001) ("the egregiousness of conduct *might* support an inference that the employer acted with the requisite state of mind") (emphases added throughout).

[4] *See DiMarco-Zappa*, 238 F.3d at 38 (concluding that the "defendants had to know that [their] discrimination was illegal"); *Space Hunters*, 429 F.3d at 427 (emphasizing that the defendants were "acutely" aware of the federal statute at issue and recognized the risk that their conduct violated that statute); *Alexander* v. *Riga*, 208 F.3d 419, 431–32 (3d Cir. 2000) (explaining that malice and reckless indifference "refer not to the egregiousness of the landlord's conduct, but rather to the

The only arguable exception is the Sixth Circuit's unpublished decision in *Jeffries* v. *Wal-Mart Stores, Inc.*, 15 F. App'x 252 (6th Cir. 2001). Although that case did not expressly cite evidence of the defendant's knowledge, it did recognize that the defendant "must at least discriminate in the face of a perceived risk that its actions will violate federal law," and relied on "evidence of egregious conduct" only because it allowed "the jury to draw an inference about the defendant's malice or reckless indifference to the plaintiff's rights." *Id.* at 264 (internal quotation marks omitted). It did not hold that egregious conduct is always sufficient to sustain a punitive award. Moreover, the Sixth Circuit's published decisions have recognized that "the question for the availability of punitive damages is whether the defendants acted with malice or reckless indifference that their actions might violate a federal statute of which they were aware." *Preferred Props., Inc.* v. *Indian River Estates, Inc.*, 276 F.3d 790, 800 (6th Cir. 2001) (internal quotation marks omitted). There certainly is no conflict in the legal standards applied in the circuits that this Court needs to resolve.

In short, no "compelling reasons" exist to grant certiorari on the question whether egregious conduct

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landlord's knowledge that it may be acting in violation of federal law," and noting that there was no suggestion that the landlord "did not know that it was illegal . . . to discriminate on the basis of race in housing"); *Ogden* v. *Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (concluding that the jury could infer from the employer's sexual-harassment policies that the plaintiff's manager "had knowledge of Title VII's proscriptions" and "acted in the face of a perceived risk that his actions would violate federal law"); *Passantino*, 212 F.3d at 516 (concluding that the jury could infer from the defendant's "continuing effort to cover up" its discrimination that it "could not have reasonably believed that its conduct was lawful").

can support an inference of malice or reckless indifference to federally protected rights. Sup. Ct. R. 10. That question is not presented here; the unpublished decision below did not address it; no court has adopted the rule WWNS proposes; and there is no conflict among the circuits for this Court to resolve. This case falls far short of the Court's standards for granting certiorari.

III. THE DECISION BELOW IS SUPPORTED BY AN INDEPENDENT AND ADEQUATE GROUND.

Finally, even if a question worthy of this Court's review were presented, this case would be an inappropriate vehicle because the decision below rests on an independent and adequate ground. As the court of appeals correctly held, the punitive damages award must be vacated regardless of whether WWNS presented sufficient evidence of malice or reckless indifference because the "jury instruction on punitive damages was also erroneous." Pet. App. 35a–36a. WWNS has not sought review of this alternative holding and has therefore waived any challenge to that aspect of the decision. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

As the court of appeals explained, the district court's *sua sponte* punitive damages instruction was woefully inadequate. DynCorp's proposed instruction correctly stated that punitive damages were available only if "a higher management official of DynCorp personally acted with malice or reckless indifference to WWNS's federally protected rights." J.A. 1186. The district court rejected this instruction and instead told the jury that it could award punitive damages if it found that "DynCorp, maliciously or with reckless

indifference discriminated against WWNS." *Id.* at 1645, 1966.

The instruction thus omitted *Kolstad*'s most critical teaching—that DynCorp must have acted in the face of a perceived risk that failing to renew WWNS's subcontract might violate federal law. It also left the jury free to impute *any* employee's motivations to DynCorp, rather than limiting the inquiry to managerial employees as *Kolstad* requires. See 527 U.S. at 543. As a result, the instruction left the jury "in complete ignorance of fundamentally controlling legal principles," to DynCorp's "serious prejudice." Pet. App. 37a (internal quotation marks and omission omitted).

Thus, even if WWNS had presented sufficient evidence to satisfy the *Kolstad* standard, the court of appeals still was right to vacate the punitive damages award because the jury was never asked to apply that standard. The existence of "other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the question presented" is fatal to WWNS's petition. Gressman, *supra* at 504. The "Court would not likely reach the question" on which WWNS seeks review, "and the decision would be robbed of any practical significance." *Id.* For this reason as well, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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